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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Civil No. C07-6045 SC

Plaintiff,

(AND RELATED CASES:
C07-5800 SC; C07-5926 SC;
C08-2052 SC)

V.

IN ADMIRALTY

M/V COSCO BUSAN, LR/IMO Ship No. 9231743, her engines, apparel, electronics, tackle, boats, appurtenances, *etc.*, *in rem*, RÈGAL STONE LIMITED, FLEET MANAGEMENT LTD., and JOHN COTA, *in personam*,

MEMORANDUM OF UNITED STATES
IN OPPOSITION TO DEFENDANT
COTA'S "JOINDER" IN REGAL STONE'S
AND FLEET MANAGEMENT'S MOTION
TO DISMISS OR IN THE ALTERNATIVE
STAY PROCEEDINGS

Defendants.

Date: May 9, 2008

Time: 10:00 a.m.

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Courtroom: Honorable Samuel Conti

PRELIMINARY STATEMENT

On April 17th, defendant Cota filed his “joinder” in the motion to dismiss filed nearly two weeks earlier by defendants Regal Stone and Fleet Management. The United States has already responded to the underlying motion pursuant to the Government’s Memorandum and Declaration filed collectively at Docket No. 56. In response to Cota’s filing, the United States incorporates by reference its foregoing papers and files the following brief response to the issues raised separately as a result of Cota’s joinder.

DISCUSSION

The underlying motion in which Cota “joins” is premised *solely* upon Regal Stone’s and Fleet Management’s attempt to rewrite the Oil Pollution Act (“OPA”), 33 U.S.C. §§ 2701, *et seq.* Under the reading of OPA made by Cota through his “joinder”, an Article III court, indeed *this* Court, has neither the jurisdictional right nor the ability to take evidence, make rulings and issue orders, decide liability, and determine damages. And in place of the Article III court that Cota would seek to oust, the “joined” motion would have the Defendant shipowner’s and ship operator’s attorneys and “claims handlers” step into the breach and render what could hardly be called neutral and independent “justice.” We have already seen the results of what that process would entail since the Court has already been forced to issue two separate ruling on the subject.^{1/}

The fundamental problem for Cota, wholly aside from the flawed premise of the underlying motion, is that Cota is *not* even a defendant under the OPA cause of action. Indeed, neither Cota *nor* the COSCO BUSAN, *in rem*, are OPA defendants and, conversely, both are sued exclusively under the separate and independent statutory causes of action established by the National Marine Sanctuaries Act (“NMSA”), 16 U.S.C. §§ 1431, *et seq.*, and the Park System Resource Protection Act (“PSRPA”), 16 U.S.C. §§ 19jj, *et seq.* [Amended Complaint, Docket No. 44, First and Fifth Causes of Action.]

^{1/} We shall not comment here on issues relating to Regal Stone's and Fleet Management's attempt to control the right of injured parties to seek relief. The Court's Orders of February 22nd and April 25th speak for themselves. [Orders of February 22 and April 25, 2008, in *Chelsea, LLC v. Regal Stone, Ltd., et al.*, N.D. Cal., No. C07-5800-SC.]

1 Our response to Cota’s “joinder” shall be brief and can be summed up by demonstrating,
 2 step-by-step, the literally absurd results which would follow were Cota’s argument to be taken at face
 3 value:

- 4 o Regal Stone and Fleet Management, like Cota and COSCO BUSAN, *in rem*, are
 5 defendants under the NMSA and PSRPA, both of which are statutes wholly separate
 6 and independent of OPA. As their names imply, the NMSA and PSRPA each
 7 govern highly protected areas of special national and environmental importance.
 8 Conversely, neither Cota nor COSCO BUSAN, *in rem*, are named under OPA;^{2/}
- 9 o Regal Stone and Fleet Management filed their motion, arguing that OPA’s “claims
 10 presentation” provision, 33 U.S.C. § 2713, precludes this Court from deciding
 11 evidentiary, liability, and damages issues; instead, according to the argument Cota
 12 implicitly adopts *via* his “joinder”, control over such issues is vested exclusively
 13 with Regal Stone and Fleet Management, who control the “claims” (*i.e.*, settlement)
 14 process. In turn, this defendant-controlled “claims” process is necessary so that
 15 Regal Stone and Fleet Management can file an administrative claim with a federal
 16 agency in order to allow the latter two Defendants not only (a) to *limit* their liability,
 17 but (b) allow them to seek *reimbursement and recovery* from a federal
 18 administrative agency for the shipowner’s and operator’s own liability and damages;
- 19 o Cota’s next implicitly adopted argument is that the foregoing process (*i.e.*, whereby
 20 the keys to the courthouse are controlled by the shipowner and ship operator) bars
 21 the United States from seeking relief before the Court – despite the fact that the
 22 presentment section of OPA, 33 U.S.C. § 2713, applies to a “person”, which term
 23 does **not** include the United States, 33 U.S.C. § 2701(27), and despite the fact that
 24 the Oil Spill Liability Trust Fund (the “Fund”), which is administered by the
 25 National Pollution Funds Center (on whose behalf the Third Cause of Action is

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 27 ^{2/} Regal Stone and Fleet Management were also sued under the judicially assessed civil penalty
 28 provision of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(b)(7). Neither Cota nor the COSCO BUSAN
 were sued thereunder.

1 asserted) is **not** defined in OPA as either a “person” or a “claimant”, but instead is
 2 a separately defined entity. 33 U.S.C. § 2701(11);

3 o The next step of Cota’s adopted argument is to ignore, completely, the various
 4 statutory “savings clauses”, not to mention *United States v. Locke*, 529 U.S. 89, 105-
 5 06, 120 S.Ct. 1135, 1146, 146 L.Ed.2d 69 (2000), that undercut the foundation for
 6 the novel and flawed argument that this Court has neither the ability nor the right to
 7 decide evidentiary issues, make rulings, determine liability, and assess damages.
 8 Cota’s joinder thus ignores, *inter alia*, OPA’s savings clause, 33 U.S.C. § 2718(c);
 9 the PSRPA’s savings clause, 16 U.S.C. § 19jj-1(d); and the legislative history
 10 emphasizing the broad scope of the PSRPA’s savings clause. See, S. REP. No. 101-
 11 328, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 603, 607;
 12 o Cota’s adopted argument then proceeds to ignore Section 1017(f)(2) of OPA, 33
 13 U.S.C. § 2717(f)(2), which explicitly provides that the United States can initiate an
 14 action “at any time” to recover removal costs. That section clearly authorizes the
 15 United States to immediately file a judicial action without any necessity of handing
 16 the courthouse keys to Regal Stone and Fleet Management, who also are alleged to
 17 be paying the fees of Cota in this action;^{3/}
 18 o If we follow the next step implicit in Cota’s argument, the United States would be
 19 required to wait up to five years to determine whether Regal Stone and Fleet
 20 Management, who control the “settlement and claims checkbook”, agree at *their*
 21 absolute discretion to “settle” claims. *See, e.g.*, Mauseth Declaration filed by Regal
 22 Stone and Fleet, Docket No. 39; see also, with respect to the “claims handling”
 23 process to date, footnote one above regarding the necessity of the Court’s issuance
 24 of its Orders of February 22nd and April 25th.

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 27 ^{3/} *Continental Insurance Co. v. John Cota, Regal Stone, Fleet Management, et al.*, C08-2052 SC
 28 (related case), Docket No. 1, paragraphs 38-39.

- o At the end of the five years (or whatever length of time the Defendants may choose to draw out the claims process), only *then* could the United States file suit. Indeed, in the case of the Third Cause of Action asserted on behalf the Fund, the Fund could decide to file suit or ... file a claim against itself!
- o Meanwhile, this Court already will have decided the cases before the Court, as well as any yet to be filed.^{4/} Thus, after five years, give or take – again, wholly dependent upon Regal Stone’s and Fleet Management’s strategic decisions as to how to control the “presentment” and “claims” process – this litigation could (re)commence, resulting in discovery and eventual trial to be scheduled anywhere between seven to ten years after the COSCO BUSAN hit the Bay Bridge in 2007. *That* is the interpretation of OPA, 33 U.S.C. § 2713, that Cota implicitly makes through his joinder in Regal Stone’s and Fleet Management’s motion.

Finally, we assume that Cota does *not* join in Regal Stone’s and Fleet Management’s motion to the extent the Defendants’ Reply Memorandum denies civil liability on their part and instead attempts to lay civil fault solely on defendant Cota’s doorstep. Based upon the opening brief filed by Regal Stone and Fleet Management, we presume that Cota assumed that the two Defendants meant *precisely what they stated to the Court* as the central tenet of their motion. Rather than paraphrase, we quote from the representation made to the Court by Regal Stone and Fleet Management:

Defendants [Regal Stone and Fleet Management] have already acknowledged that they are strictly liable to pay for removal costs and damages resulting from the COSCO BUSAN incident. Given this situation, there is no case or controversy for the court to address.

Opening Brief of Regal Stone and Fleet Management, Docket No. 36, page 2, lines 5-9. As if the point of a concession of liability needed emphasizing in a case with private and government damages of the magnitude here, Regal Stone and Fleet Management *restated* the civil liability concession

^{4/} *Shogren v Regal Stone, et al.*, N.D. Cal., No. C07-5926-SC; *Chelsea LLC v. Regal Stone, et al.*, N.D. Cal., No. C07-5800-SC; *Continental Insurance Co. v. Cota, Regal Stone, et al.*, C08-2052 SC. In addition, there are two state court cases that have been filed, one by local governments and one by private parties.

1 again at page 15, lines 24-26.

2 We now find, however, that after their representation to the Court was taken by the litigants
 3 (and presumably the Court) at face value, the Defendants are engaged in backtracking at breakneck
 4 speed and urging that what they *really* meant to say to the Court (but didn't) was that they concede
 5 strict civil liability – *but only subject to whatever defenses they might conjure!*

6 Wholly besides the liability about-face and the matter of judicial admissions and estoppel,
 7 Regal Stone's and Fleet Management's belated attempt to "reserve" defenses despite an express
 8 admission of strict civil liability is made even more breathtaking by their profoundly contrary
 9 assertion that "there is no case or controversy for the court to address". In any event, we shall
 10 assume (unless otherwise advised by Cota) that Cota's "joinder" in the motion does not include
 11 joinder in Regal Stone's and Fleet Management's statements directed at him in the related civil cases
 12 before the Court.^{5/}

13 **CONCLUSION**

14 For the reasons stated above, Defendant Cota's "joinder" in the motion filed by Regal Stone
 15 and Fleet, said joinder requesting dismissal of the action as against Cota, should be denied.

16 Dated: May 1, 2008.

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 17 Acting Assistant Attorney General

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22 /s/ Bradley R. O'Brien
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 27 ^{5/} Cota is a defendant in three of the related civil cases before the Court: *United States v. Regal Stone*
Ltd., et al.; Shogren Living Trust, et al v. Cota, Regal Stone, Ltd., et al; and *Continental Insurance Co.*
v. Cota, Regal Stone, et al.